SUPREME COURT, U. S.

FILED

NOV 2 1967

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 133

RUBY KOLOD, WILLIE ISRAEL ALDERMAN, and FELIX ANTONIO ALDERISIO, *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR REHEARING AND MOTION FOR DISCLOSURE OF ELECTRONIC SURVEILLANCE

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INDEX

	Page
PETITION FOR REHEARING AND MOTION FOR DISCLOSURE OF ELECTRONIC SURVEILLANCE	1
REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT	2
CONCLUSION	12
APPENDIX A	1a
APPENDIX B	6a
APPENDIX C	8a
APPENDIX D	10a

CITATIONS

CASES:

Battle v. *United States*, 345 F. 2d 438 (D.C. Cir. 1965) 12
Black v. *United States*, 384 U.S. 927 (1966) 1, 12, 13, 2a
Brady v. *Maryland*, 373 U.S. 83 (1963) 7
Campbell v. *United States*, 365 U.S. 85 (1961) 3, 8
Dennis v. *United States*, 384 U.S. 855 (1966) 3, 5, 7, 9, 10, 11, 5a, 8a
Flynn v. *United States*, 99 L. ed. 1298 (1955) 4a, 5a
Hoffa v. *United States*, 387 U.S. 231 (1967) 12, 2a
Lancey v. *United States*, 356 F. 2d 407 (9th Cir. 1966) 10
Markis v. *United States*, 387 U.S. 425 (1967) 12, 2a
McGarry v. *United States*, No. 6925, 1st Cir. 3a
Miranda v. *Arizona*, 384 U.S. 436 (1966) 6
In Re Murchison, 349 U.S. 133 (1955) 10, 9a
O'Brien v. *United States*, 386 U.S. 345 (1967) 12, 2a
Offutt v. *United States*, 348 U.S. 11 (1954) 10
People v. *Cartier*, 51 Ca. 2d 590, 335 P. 2d 114 (1959) .. 7
Roviaro v. *United States*, 353 U.S. 53 (1957) 6, 9
Schipani v. *United States*, No. 504, October Term 1966 4, 9, 12, 3a, 4a, 6a, 8a

Page

U.S. ex rel. Touhy v. *Ragen*, 340 U.S. (1951) 6
United States v. *Baker*, 262 F. Supp. 657 (D.D.C. 1966) 7
United States v *Coplon*, 185 F. 2d 629 (2d Cir. 1950) 5, 10, 11
United States v. *Cotton Valley Operators Committee*, 9 F.R.D. 719 (W.D. La. 1949), *aff'd by an equally divided Court*, 339 U.S. 940 (1950) 6
United States v. *Green* and *United States* v. *Winston*, 140 F. Supp. 117 (S.D.N.Y. 1956), *aff'd*, 231 F. 2d 631 (2d Cir. 1957), *aff'd* 356 U.S. 165 (1958) 5a
United States v. *Hall*, 101 F. Supp. 666 (S.D.N.Y. 1951) *aff'd*, 198 F. 2d 726 (2d Cir. 1952), *cert. denied*, 345 U.S. 905 (1953) 5a
United States v. *Nesline*, Cr. Nos. 535-65 and 536-65 (D.D.C. 1965) 2a, 3a, 4a
United States v. *Price*, 383 U.S. 787 (1966) 10
United States v. *Reynolds*, 345 U.S. 1 (1953) 3, 5, 6, 7, 8
United States v. *Thompson*, 117 F. Supp. 685 (S.D.N.Y. 1953) aff'd, 214 F.2d 545 ..... 5a
United States v. *Wade*, 388 U.S. 218 (1967) 6, 10, 9a
Zimmerman v. *Poindexter*, 74 F. Supp. 933 (D. Hawaii 1947) 5

RULES AND STATUTES:

Rule 6(e), Federal Rules of Criminal Procedure 9
Rule 16(a)(1), Federal Rules of Criminal Procedure..7, 11
Rule 41(e), Federal Rules of Criminal Procedure 12, 8a
Rule 25(2), Rules of this Court 2, 13, 1a, 4a, 5a
5 U.S.C. § 22 (1964 ed., repealed) 6
5 U.S.C. § 301 6
18 U.S.C. § 4 10
18 U.S.C. § 241 10
18 U.S.C. § 3500 8
42 U.S.C. § 1987 10

MISCELLANEOUS: Page

Advisory Committee Notes on Rule 16, 39 F.R.D. 175 .. 7

2 Bentham, *Rationale of Judicial Evidence,* Ch. X, § 2 (1st ed. 1827) 10

Comment, 54 California Law Review 1070 (1966) 12

Comment, 74 Yale Law Journal 1297 (1965) 10

Department of Justice Order No. 381-67, 32 Fed. Reg. 9662 (1967) 6

H. Rep. No. 1461, 85th Cong., 2d Sess., March 6, 1958, 1958 U.S. Code Cong. & Adm. News 3358 6

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v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR REHEARING AND MOTION FOR DISCLOSURE OF ELECTRONIC SURVEILLANCE

Petitioners pray that this Court grant rehearing of its order of October 9, 1967, denying the petition for a writ of certiorari, and that a writ of certiorari issue on questions 1 and 2 presented in the petition, and on the following additional question:

> Whether, when the Department of Justice has in its possession recordings of a criminal defendant's voice obtained through electronic surveillance, the Department may refuse unqualifiedly to disclose

> the existence and contents of those recordings unless in its untrammelled discretion, free from judicial control, it determines *both* that the surveillance "is or may be unlawful" *and* "that the government has thereby obtained any information which is arguably relevant to the litigation involved."

In the alternative, petitioners request that the Court order the Solicitor General to file a memorandum containing such information as was required by the Court's order in *Black* v. *United States,* 384 U.S. 983 (1966), and that the Court, pending receipt of the memorandum, hold in abeyance its determination of this petition.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

The intervening circumstance which warrants rehearing is the Department of Justice insistence, in the exchange of memoranda concerning petitioners' application for an order suspending the effect of the denial of certiorari, upon its right to refuse disclosure of electronic surveillance in its discretion, rather than under judicial control. For the information of the full Court, the following are attached as appendices to this petition: "Application For An Order Under Rule 25(2) Suspending The Order Of Denial Of Certiorari Pending Filing Of A Petition For Rehearing," attached as Appendix A; the Acting Solicitor General's "Response To Application For An Order Under Rule 25(2) Suspending The Denial Of Certiorari Pending Filing Of A Petition For Rehearing," attached as Appendix B; "Reply Memorandum Re Application For An Order Suspending The Order Of Denial Of Certiorari," attached as Appendix C; and, Mr. Justice White's Order of October 17, 1967, suspending the

effect of the order of denial of certiorari, attached as Appendix D.

A review of the events since denial of certiorari, as reflected in the appended pleadings, reveals the following: After the petition for certiorari was filed, counsel received information justifying a belief that in the course of electronic surveillance conducted by a government agency, probably the FBI, the voice of petitioner Alderisio had been overheard. The application for an order suspending the denial of certiorari stated this belief, and contained a request that the Department of Justice make a statement on the matter of surveillance. The application also recited that the Acting Solicitor General had undertaken to look into possible electronic surveillance. The Acting Solicitor General made his inquiries, and then filed a reply opposing suspension of the denial of certiorari. This truly extraordinary reply, Appendix B to this petition, summarized the events leading to its filing, and then set out the Department's view that it was not required in this or any other case to disclose the existence of illegal electronic surveillance unless it made a preliminary "relevance" determination. This statement, as we argue below, presents for this Court's consideration questions analogous to those presented by claims of privilege, see, *e.g., United States* v. *Reynolds,* 345 U.S. 1 (1953), by demands for Jencks Act statements, see *Campbell* v. *United States,* 365 U.S. 85 (1961), and by motions for grand jury minutes, see *Dennis* v. *United States,* 384 U.S. 855 (1966). In those cases, this Court has firmly declined to make the executive branch rather than the courts the final arbiter on questions of producing government records for use in litigation to which the government is a party.

Petitioners filed a reply to the Solicitor General's pleading and, on October 17, Mr. Justice White granted the petitioners' application. Petitioners remain free on bond pending disposition of this petition.

Petitioners submit that this case presents an urgent need for exercise of the Court's supervisory power over federal criminal justice, including an order setting out the conditions under which electronic surveillance should be disclosed under judicial supervision in all federal criminal cases, and granting petitioners an opportunity to ensure, through adversary litigation, that their prosecutions are free of all taint from illegal surveillance. The discussion below analyzes the Department's position in this case, suggests means consistent with the past decisions of this Court for dealing with disclosure of surveillance, and, finally, discusses the relief which should be granted at this stage.

The Department of Justice Position

The Department of Justice, through the Acting Solicitor General, has said that its policy is:

> "to make disclosure if it finds (1) that there has been an electronic surveillance which is or may be unlawful, and (2) that the government has thereby obtained information which is arguably relevant to the litigation involved." Appendix B, *infra*.[1]

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[1] This policy is a restatement of that set out in Supplemental Memorandum for the United States, *Schipani* v. *United States*, No. 504, October Term 1966, p. 5. It apparently represents the Department's attitude toward trial and appellate courts, including this Court. The number of cases in this Court alone in which illegal surveillance has been conceded should indicate that this policy has substantial impact upon the administration of federal criminal justice.

This case, the Acting Solicitor General said, "did not come within the Department's policy of disclosure." He declined to say which of the two requirements for disclosure were not met. The Department, by its refusal to specify the grounds for its nondisclosure, forces the assumption that there is illegal surveillance in this case,[2] and that it has decided the surveillance is not "arguably relevant."

Any disclosure requirement, including one regarding electronic surveillance, must accommodate two policies: the defendant's need for the information and the government's wish to preserve the confidentiality of internal governmental files and memoranda. When the issue is electronic surveillance, and a criminal prosecution is in train, the defendant's need to protect himself from illegal evidence-gathering makes his claim upon government files stronger than in any other litigating posture. *Dennis* v. *United States,* 384 U.S. at 873, n. 20. Correspondingly, since the government seeks to change the status quo and deprive the defendant of his liberty, its claims of privilege or confidentiality or irrelevance must be seen as correspondingly weak. See, *e.g., United States* v. *Reynolds,* 345 U.S. 1, 11-12 (1953); *United States* v. *Coplon,* 185 F.2d 629, 636-40 (2d Cir. 1950); *Zimmerman* v. *Poindexter,* 74 F. Supp. 933 (D. Hawaii 1947).

However, the balance ought to be struck, the law has been clear that the decision is for the judiciary. "Judicial control over the evidence in a case cannot

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[2] And, indeed, in every case where the Department is silent as to surveillance.

be abdicated to the caprice of executive officers." *United States* v. *Reynolds*, 345 U.S. at 9-10.[8]

How does this undisputed rule apply when the government has conducted electronic surveillance? First, there is the issue whether the government has "tapped" the defendant's wires or otherwise engaged in illegal surveillance. Absent some chance discovery of illegal surveillance, the defendant has a dificult task. It is made more difficult by the secretive and often affirmatively disingenuous behavior of government agents. See materials cited in Appendix A, *infra*. This behavior makes a surveillance case unlike a lineup case, *United States* v. *Wade*, 388 U.S. 218 (1967), or confession case, *Miranda* v. *Arizona*, 384 U.S. 436 (1966),

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[8] In the past, the Department has claimed the power to keep its internal files confidential and free from judicial scrutiny. In *U.S. ex rel. Touhy* v. *Ragen*, 340 U.S. 462 (1951), this Court held that a regulation which required all demands for Department of Justice papers to be referred to the Attorney General was a valid "housekeeping" provision. The Court expressly declined to decide the validity of that portion of the regulation declaring all Department files confidential. The question left open in *Touhy* may be regarded as closed by the holding in *Reynolds, supra*, and in criminal cases the question is indisputably settled by *Roviaro* v. *United States*, 353 U.S. 53 (1957). See also *United States* v. *Cotton Valley Operators Cttee.*, 9 F.R.D. 719 (W.D. La. 1949), *aff'd by an equally divided Court*, 339 U.S. 940 (1950). Moreover, the Attorney General's regulations no longer declare Department files confidential, see Dept. of Justice Order No. 381-67, 32 Fed. Reg. 9662 (1967), and indeed could not do so under the statutory authorization for the regulation, 5 U.S.C. § 301. § 301 expressly provides that it "does not authorize withholding information from the public." The predecessor section, 5 U.S.C. § 22 (1964 ed., repealed), containing the same language, was expressly designed to correct a situation in which "every file clerk [had] become a censor." H. Rep. No. 1461, 85th Cong., 2d Sess., March 6, 1958, set forth in full at 1958 U.S. Code Cong. & Adm. News 3358, 3359. Thus, there is no conceivable judicial, statutory or administrative regulation support for the Department's intransigence.

for the defendant usually has no way of knowing that he has been "bugged" or that the fruits of the illegality have been made part of the case against him. However, Rule 16(a)(1), Federal Rules of Criminal Procedure, provides a procedure for discovering recordings of the defendant's voice, or transcripts thereof. Where the purpose of the discovery motion is to unearth illegal surveillance, production of all recordings may be a due process right as well, and the government may be required to come forward with all the facts. See Advisory Committee Notes on Rule 16, 39 F.R.D. at 175-76; *People* v. *Cartier,* 51 Cal.2d 590, 335 P.2d 114 (1959). *Cf. Brady* v. *Maryland,* 373 U.S. 83 (1963). The relevance requirement of Rule 16(a)(1) must be read in light of the government's obligation to purge its case of the taint of illegal surveillance. That is, recordings or transcripts which are not prima facie "relevant" may be revealed in the course of an adversary suppression hearing to be so related to the prosecution as to require its dismissal. Moreover, even though the recordings or transcripts are found to have nothing to do with the issues in the case in which they are produced, the court must nonetheless suppress them in order to prevent their future use. See *United States* v. *Baker,* 262 F. Supp. 657, 667 (D.D.C. 1966).

In any case, the determination of "relevancy" under Rule 16, like that of "privilege" under Federal Rule of Civil Procedure 34, is clearly for the Court and not for the Justice Department. *United States* v. *Reynolds,* 345 U.S. at 6-8. See also *Dennis* v. *United States,* 384 U. S. 855, 874-75 (1966).

The Department's surveillance position affronts more, however, than the policy of Rule 16. It offends as well policies set out by this Court as crucial to the

fair ordering of the adversary system. For example, in *Campbell* v. *United States, supra,* the issue was whether the defense was entitled under the Jencks Act, 18 U.S.C. § 3500, to see a report prepared by FBI Agent Toomey from a conversation with prosecution witness Staula. The government contended that the statement was Toomey's, not Staula's, and hence not producible after Staula's direct examination. The trial judge ruled that the defense could call Toomey as "their witness" an attempt to establish that the statement had been prepared as a substantially verbatim recital of Staula's words, or that Staula had adopted it. This action the Court held error. In his majority opinion, Mr. Justice Brennan affirmed that control of Jencks Act production is a judicial function, and that the government has a clear duty to come forward and disclose to the Court any information which may assist the judge in discharging his responsibility. 365 U.S. at 95-96. The Court declined to place upon the defendant "the burden . . . . of establishing facts peculiarly within the knowledge of his adversary." *Id.* at 96.

The same interests of prosecution and defense as in *Campbell,* see *id.* at 95, are involved when the existence, nature and extent of electronic surveillance must be ascertained. Indeed, it is shown below that the defense interest is stronger in an electronic surveillance case.

Another fruitful analogy may be drawn to *United States* v. *Reynolds, supra.* That case, involving government resistance to civil discovery in a Tort Claims Act suit of airplane crash information claimed to have national security value, dealt at length with the need for disclosure of information helpful to litigants,

and the countervailing need of government to shield some information from the public view. This Court drew upon its experience in cases in which the self-incrimination privilege is invoked, and held that in each case the decision whether to honor the privilege is with the Court. See 345 U.S. at 6-12.

In *Dennis v. United States,* 384 U.S. 855 (1966), this Court drew upon the teaching of *Campbell* and *Reynolds,* as well as that of such cases as *Roviaro* v. *United States,* 353 U.S. 53 (1957), and held the defendants entitled to production of grand jury minutes for use in cross-examination of government witnesses. But the majority opinion spoke broadly also of the prosecution's duty to come forward with material which might aid the defense. The Court placed F.R. Crim. P. 6(e)'s authorization for production of grand jury minutes squarely within the framework of Jencks Act and Rule 16 discovery, and put official imprimatur upon the growing movement for fuller discovery in federal criminal cases. See, *e.g.,* 384 U.S. at 871, nn. 16-.7. *Dennis* carries within it the theoretical basis for a move even beyond *Reynolds* and *Campbell,* for the Court exhorted trial judges to make disclosure the usual rule, and to intervene only in "unusual situations," on application of the government to deny or restrict disclosure. *Id.* at 874-75.

Thus, the power to lock "the doors that may lead to truth," id. at 873, which the Department of Justice claims in its *Schipani-Kolod* policy memoranda, is utterly without legal support and, indeed, runs contrary to the course of this Court's decisions in the field of criminal discovery.

Much more than this is at stake, however. The government is not merely seeking to bar access to "a

storehouse of relevant fact," *Dennis* v. *United States,* 384 U.S. at 873, but also to the truth about a massive campaign of electronic surveillance consciously conceived and directed by government agents in the knowledge that it was and is illegal.[4]

Given these disturbing facts, it is all the more important that the Department be denied the power it seeks, for that power makes it judge of its own cause in a field where its reputation stands most to be sullied by disclosure of illegality. *Cf. In re Murchison,* 349 U.S. 133 (1955); *Offutt* v. *United States,* 348 U.S. 11 (1954).[5] The Department's claim ignores, moreover, the plain mandate for judicial hearing set out in *United States* v. *Coplon,* 185 F.2d 629, 636-40 (2d Cir. 1960), cited with approval in *Dennis,* 384 U.S. at 874, n. 20, and the requirement of *United States* v. *Wade,* 388 U.S. 218, 240 (1967), that the government purge its prosecutions of illegal evidence-gathering by "clear and convincing proof."

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[4] Illegal electronic surveillance violates the Fourth Amendment rights of its victims. Those who conspire to commit such violations also violate 18 U.S.C. § 241, as authoritatively interpreted in *United States* v. *Price,* 383 U.S. 787, 803 (1966). Refusals by Department of Justice attorneys to respond to requests that they admit illegal surveillance raise serious questions under 18 U.S.C. § 4, the federal misprision of felony statute. See generally *Lancey* v. *United States,* 356 F.2d 407 (9th Cir. 1966). These questions are independent of and in addition to these arising under 42 U.S.C. § 1987 by the failure of the Department of Justice to prosecute the lawbreakers. See generally Comment, 74 *Yale L.J.* 1297, 1303-12 (1965).

[5] The material cited in Appendix A clearly reveals that the Department may have trouble getting its own agents to own up to illegality. A judicial hearing in the offing may serve to induce disclosure, and the checks upon veracity provided by cross-examination and publicity serve to further this end. See 2 Bentham, *Rationale of Judicial Evidence,* Ch. X, § 2 (1st ed. 1827).

In the vast majority of cases, disclosure of the operation of an electronic surveillance, and of its fruits, should pose no problem. Hence, the materials ought to be producible under Rule 16(a)(1). If the government feels the need for a protective order in the unusual situation, such as that "involving the nation's security or clearcut dangers to individuals who may be identified" by the material to be produced, *Dennis,* 384 U.S. 875, then an appropriate showing can be made.

In particular cases, proceedings or showings held partly in camera may be necessary, keeping in mind the clear ruling of the *Coplon* court, 185 F.2d at 636-40, that such proceedings pose serious dangers to the fair determination of a suppression motion and to the very right to public trial itself. The government has, in any event, made no such claim in this case.

It may well be that the remedy here proposed will occasion great expense and inconvenience to the government in litigating electronic surveillance issues. The remedy, however, is only coextensive with the wrong.

What Relief in This Case?

Counsel had been informed, before filing the application for an order suspending the effect of denial of certiorari, that petitioner Alderisio's place of business in Chicago was the target of electronic surveillance. If the surveillance was conducted during the time counsel is informed its was conducted, it is certain to have monitored conversations between counsel and Alderisio. This issue cannot, of course, be explored on this record. Presented here is the narrow, precise, clear question of who runs the system of criminal justice, the Department or this Court.

However, if the Court grants certiorari and throws over the Department's *Schipani-Kolod* policy, a full evidentiary hearing is the irreducible minimum required to protect petitioners' Fourth Amendment rights. See *Black* v. *United States,* 385 U.S. 26 (1966); *O'Brien* v. *United States,* 386 U.S. 345 (1967); *Hoffa* v. *United States* 387 U.S. 231 (1967); *Markis* v. *United States,* 387 U.S. 425 (1967). Whether such a hearing should be conducted as a posttrial proceeding on remand by this Court, as in *Hoffa,* or as a pretrial hearing after reversal of the conviction, is a difficult question. Petitioner urges that, if electronic surveillance is disclosed, the Court do as it did in *Black* and reverse for a new trial. As a practical matter, in a posttrial hearing the odds are heavily against the defendant in any criminal case. The government should not, by choosing an opportune time for disclosure, be able to deprive the defendant of his right to a pretrial hearing under Rule 41(e), Federal Rules of Criminal Procedure. The Rule 41(e) preference for a hearing prior to trial reflects a considered policy judgment, see Comment, 54 *Calif. L. Rev.* 1070, 1082-83 (1966), and is designed to protect the interest of the defendant, see *Battle* v. *United States,* 345 F.2d 438 (D.C. Cir. 1965), as well as the interest of the government and the courts in the expeditious administration of justice.

CONCLUSION

For the foregoing reasons, petitioners pray that rehearing be granted upon issue 1 and 2 in the petition for certiorari, and upon the additional issue tendered in this petition, and that upon the rehearing a writ of certiorari issue, the judgment of conviction be reversed, and the cause remanded for further proceedings. In the alternative, petitioners pray for an order directing

the Solicitor General to make a disclosure concerning electronic surveillance coextensive with that required in *Black* v. *United States,* 384 U.S. 983 (1966), and retaining jurisdiction pending the disclosure.

Respectfully submitted,

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November 2, 1967

Certificate

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and that it is restricted to grounds specified in Rule 58(2) of the Rules of this Court.

EDWARD BENNETT WILLIAMS